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No. 97-1927

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RODNEY C. HANLON, *et al.*,
Petitioners,

v.

PAUL W. BERGER, *et ux.*, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, AND JACK HAMANN IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to the defense of qualified immunity?

PARTIES TO THE PROCEEDINGS

Cable News Network, Inc., a twenty-four-hour television news network, its parent company Turner Broadcasting System, Inc. ("Turner"), and Jack Hamann, Robert Rainey and Donald Hooper, journalists employed by the network (collectively, "CNN" or "CNN Respondents"), are Respondents submitting this brief in support of the Petitioners in *Hanlon v. Berger*, No. 97-1927, pursuant to Rule 12.6 of the Rules of this Court. The CNN Respondents, along with Petitioners Rodney Hanlon, Joel Scrafford, Kris A. McLean, Richard C. Branzell, and Robert Priekstat ("Petitioners"), and the United States of America, were appellees in the Ninth Circuit decision and defendants in the district court decisions below. CNN joins with Petitioners in urging reversal of the Ninth Circuit judgment.

This action began as two proceedings in the United States District Court for the District of Montana, both initiated by Respondents Paul and Erma Berger. One named as defendants the Petitioners (who are four United States Fish and Wildlife Service agents and an Assistant United States Attorney) and the United States of America, as well as Turner and journalists Rainey and Hooper. The other named as defendants Cable News Network, Inc. and reporter Hamann. The district court issued separate but, with respect to the CNN Respondents, materially identical opinions. On appeal by the Bergers, the Ninth Circuit treated the cases as one and issued a single judgment, reversing in part summary judgment that had been entered in favor of the CNN Respondents and the Petitioners.

Petitioners and CNN filed separate petitions for *certiorari* seeking review of the Ninth Circuit opinion. The United States did not seek review. CNN's Petition, No. 97-1914, which presents an additional question not included in the instant case, is still pending.* In this brief

* CNN's pending Petition presents a question separate from that to be reviewed in the instant case: whether members of the news media who observe government agents executing a warrant are state actors such that they may be subjected to constitutional liability as if they were government officers themselves.

in support of the Petitioners, CNN addresses the first Question Presented—that is, whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record the officers' execution of an otherwise valid warrant. CNN does not seek relief from this Court under the second Question Presented—whether the government agents are entitled to a defense of qualified immunity—and therefore this brief does not address that question.

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Cable News Network, Inc. and Turner state the following: Time Warner Inc. is the parent company of Respondent Turner which, in turn, is the parent company of Respondent Cable News Network, Inc. Neither Turner nor Cable News Network, Inc. has any nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 129 F.3d 505 and is reprinted in the Appendix to the Petitioners' Petition for *Certiorari* ("Pet. App.") at 1a-26a. The district court order in *Berger v. Hanlon* was not reported (except at 24 Media L. Rep. (BNA) 1748 (D. Mont. 1996)) and is reprinted at Pet. App. 27a-47a.[1]

[1] The district court's decision in *Berger v. CNN, Inc.* was not reported (except at 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), was not appended to the Petitioners' Petition for *Certiorari*, and is not cited to herein. That decision is materially identical to the district court's decision in *Berger v. Hanlon* in all respects relating to the CNN Respondents.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997 and denied petitions for rehearing and suggestions for rehearing *en banc* from Petitioners and the CNN Respondents on February 25, 1998. *Id.* at 48a. Petitioners filed a timely petition for *certiorari* on May 26, 1998 in No. 97-1927. This Court granted *certiorari* to the Ninth Circuit on November 9, 1998, consolidating *Berger v. Hanlon* with *Wilson v. Layne*, No. 98-83. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmance, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. Reporter Hamann's Investigation of Wildlife Enforcement Efforts.

In early 1993, reporter Hamann, a Seattle-based correspondent for Cable News Network who regularly reports on environmental matters and other news from the western United States, began investigating reports that western ranchers were eluding prosecution for illegally poisoning endangered species. J.A. 131-34.[2] The reports were newsworthy for several reasons. Hamann sought to learn what, if anything, federal authorities were doing to stop illegal

[2] The Joint Appendix is referred to herein as "J.A."

wildlife killings. *Id.* He also wanted to report on the conflict between the federal government's efforts to enforce wildlife laws and the sympathies of local officials and juries toward ranchers' efforts to protect livestock from predators. *Id.*; R. 8/8, tape 11, page 2.[3]

In the course of his newsgathering, Hamann learned that the Fish and Wildlife Service ("FWS") would be conducting a search of the property of a Montana rancher suspected of poisoning wildlife. Unbeknownst to Hamann, the rancher was Paul Berger. The FWS had been investigating Mr. Berger since January 1993, when former employees of the Bergers reported that they had seen him deliberately poisoning and shooting eagles. Pet. App. 4a; R. 8/8, tape 8, page 13. The FWS investigation of Berger had begun *before* Hamann learned of the planned search of the Berger property. Pet. App. 4a.

In an effort to obtain evidence concerning their suspicions about Mr. Berger's illegal activities, the FWS sought a warrant to search the Bergers' 75,000-acre ranch near Billings, Montana. On March 18, 1993, a federal magistrate judge issued FWS agents a search warrant and two seizure warrants, authorizing them to search the ranch for evidence that wildlife were being killed in violation of federal law. *Id.* at 5a; J.A. 17-43. The validity of the warrants has never been questioned in these proceedings.

Prior to the execution of the warrants—but at least two months *after* the FWS had initiated its investigation of Berger—the FWS gave CNN permission to accompany its agents during the execution of a search. Pet. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March

[3] The excerpts of record ("R.") refer to the two volumes submited by the Bergers in the appeal of the district court decision in *Berger v. Hanlon*. The references are to the tab number within the record and the exhibit within the tab.

22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[4]

B. CNN's Observation of the FWS Execution of the Warrants.

As part of its coverage of the search, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked several questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, R. 8/8, tape 5, pages 4, 6, but the record contans no evidence that CNN played any role in the briefing, assisted in planning the search, or coordinated in any way with the government beyond what was necessary to arrange to observe and record the search for newsgathering purposes.

The warrants were executed on March 24, 1993. The group of twenty-one government agents executing the warrants drove to the ranch, followed in a private vehicle by journalists Hamann, Rainey and Hooper. R. 8/7 at 27; R. 8/8, tape 6, page 3-tape 7, page 2. The CNN crew members were dressed in casual clothes, in contrast to many of the law enforcement officers on the scene who were either in uniform or wore hats or jackets with government agency patches or labels and were visibly armed with handcuffs and guns. R. 8/8, tape 6, pages 3-4. One of the government vehicles had a small, fixed CNN camera mounted on its hood facing into the vehicle. FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. Pet. App. 6a; R. 8/8, tape 7, pages 1-23-tape 20, page 1.

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[4] This was the complete substance of the letter, which is set out in its entirety in the Ninth Circuit opinion. Pet. App. 4a-5a. The letter merely confirmed that CNN had permission to accompany the government agents.

While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public roads. Pet. App. 6a. CNN never entered the Bergers' home, though Agents Scrafford and Branzell did with Mr. Berger's consent. *Id.*; R. 8/8, tape 7, page 16 (tape transcript of Berger consenting to agents' entry into house). The agents did not search for evidence inside the home. R. 2/1 ¶ 4. Mr. Berger's voluntary conversations with the FWS agents both inside and outside the house were recorded through the microphone Scrafford was wearing. Pet. App. 6a.

During the several-hour search, the CNN crew interviewed Assistant United States Attorney ("A.U.S.A.") Kris McLean who was present for the execution of the warrants. R. 8/8, tape 11, pages 2-8. Asked why the government agents permitted CNN to observe and record the search, he stated:

> Well, it's really . . . motivated by the prosecutor's self-interest in getting the word out to other people that might be contemplating these crimes right now, that, if you get caught, there are going to [sic] serious consequences. And we are watching. So you get the deterrent effect of . . . the publicity and the story that you'll do. . . .

Id. page 8. McLean also explained that local sentiment that "the government just shouldn't be interfering with us" and sympathy for "home-town" ranchers and for "the right to control predators" made federal enforcement of wildlife laws difficult. *Id.* pages 2-4. In the county where the Bergers resided, McLean said, local residents and officials, including the elected sheriff, are "very anti-government." *Id.* page 7.

Based on evidence the FWS agents lawfully obtained during the search, Berger was charged with violating a federal law that prohibits killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the

intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of other charges. *United States v. Berger,* CR 93-46-BLG-JDS (D. Mont. Oct. 20, 1995). Pet. App. 7a.

Seven months after the search, and nearly two months after Berger's conviction, CNN used portions of its footage of the search on the environmental news programs "Earth Matters" and "Network Earth," as part of its news coverage of government efforts to protect endangered species. The footage made up a portion of each program. The programs were shown in October 1993 and several times in 1994. They have not been shown since. *Id.* at 2a; R. 8/9.

C. Proceedings Before the District Court.

After Paul Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), claiming (1) that the federal agents violated the Fourth Amendment by permitting the news media to attend and record the search, and (2) that by observing the search, CNN acted under color of federal law and thus was accountable for the Fourth Amendment violation as if it too were a government actor. Pet. App. 2a-3a. The Bergers also brought state law trespass, conversion and intentional infliction of emotional distress claims against CNN, *id.* at 2a, 22a-25a, and alleged that CNN violated the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.* Pet. App. 21a. Additionally, the Bergers sought an injunction restraining CNN's future broadcasts of its news footage. *Id.* at 25a.

The district court granted summary judgment for all defendants. The court correctly noted that to establish *Bivens* liability, the Bergers had to prove defendants (1) acted under color of federal law and (2) deprived them of a constitutionally protected right. *Id.* at 40a n.3. The

court held that the Bergers failed to establish that CNN acted under color of law, because its presence during the search was a means of furthering CNN's own private newsgathering interests. *Id.* at 40a.

As to whether the government defendants violated the Bergers' constitutional rights, the district court found that it was not clearly established that the Fourth Amendment is violated when law enforcement agents allow journalists to accompany them during the execution of a valid search warant, and therefore that the government defendants were entitled to qualified immunity. *Id.* at 30a-36a, 45a n.5. The court distinguished cases in which a private party *assisted* in executing a warrant or *participated with* government agents in the search for evidence, noting that "CNN was simply observing the agents who were serving the warrant." *Id.* at 36a. The district court also "recognize[d] the error made by the Second Circuit" in *Ayeni v. Mottola,* 35 F.3d 680 (2d Cir. 1994), in defining the Fourth Amendment right in question to be "the general Fourth Amendment right of privacy," rather than asking specifically whether police who allow journalists to observe and record the execution of a valid warrant violate a clearly established Fourth Amendment right. Pet. App. 32a-33a. "To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights." *Id.* at 34a.

D. Proceedings Before the Ninth Circuit.

The Ninth Circuit reversed. On the *Bivens* question, the court began with the premise that because of the arrangements CNN made with the FWS to facilitate its newsgathering efforts,

> [t]his was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming.

Id. at 9a-10a. Without discussing CNN's independent newsgathering purpose for observing the search and despite its private status, the Ninth Circuit found that CNN acted under color of law because it was a "willful participant in joint action with the [government] or its agents," and thus could be held liable under *Bivens*. *Id.* at 18a.

The Ninth Circuit also reversed the district court's finding that the FWS agents did not violate any clearly established Fourth Amendment right. In a one-paragraph discussion citing no case law, the Ninth Circuit held that in permitting CNN to attend and record the execution of the warrants, the Petitioners violated the Fourth Amendment. *Id.* at 9a-10a. The court reasoned that the government agents' actions were unconstitutional because they allowed CNN to "invade" the Bergers' property and because they conducted a search "intended to serve a major purpose other than law enforcement"—namely, obtaining "publicity" for the government and "material for . . . commercial programming" and "entertainment" for CNN. *Id.* at 2a, 10a. Further, the court held that it was "clearly established" at the time of the search that the agents' conduct violated the Fourth Amendment, and thus the agents could not assert a defense of qualified immunity.

The court reversed the district court's summary judgment in favor of CNN on two state law claims, and remanded for further proceedings. The court found, first, that CNN's alleged intrusion onto the Bergers' land stated a claim for common law trespass. *Id.* at 22a-23a. Second, the court held that based on this trespass and the alleged violation of their privacy, the Bergers had stated a claim for intentional infliction of emotional distress. *Id.* at 25a. The trespass and emotional distress claims are still pending, and they will be heard in the district court regardless of the outcome of the issues pending before this Court or the disposition of CNN's Petition for *Certiorari*.

The Ninth Circuit affirmed the district court's dismissal of the Bergers' claim that CNN tortiously converted their images and voices, rejected the Bergers' claim under the Wiretap Act, and denied their requested injunction, finding it would be an unconstitutional prior restraint on CNN's First Amendment right to broadcast news. *Id.* at 21a, 24a, 25a.[5]

SUMMARY OF ARGUMENT

In this case, the Court considers whether agents of the United States Fish and Wildlife Service violated the Fourth Amendment by permitting a Cable News Network reporter and two cameramen to observe and videotape the otherwise reasonable execution of valid search and seizure warrants on the 75,000-acre Montana ranch of Respondents Paul and Erma Berger. The Fourth Amendment proscription, however, applies only to a "search" or a "seizure," neither of which occurred as a result of the FWS grant of permission to CNN to observe and videotape the warrant execution. Because the Bergers' asserted privacy expectation in their ranchlands and outbuildings and in their consensual conversations with individuals they knew to be law enforcement officers is not reasonable, CNN's presence was not a Fourth Amendment search. Furthermore, because CNN's videotaping did not meaningfully interfere with the Berger's possessory interests in their property, CNN's videotaping was not a constitutional seizure.

Even if the Fourth Amendment applies here, it does not create an absolute right to preserve privacy. Rather, it contemplates that when the legitimate interests of the public and of law enforcement are significant, the individual's

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[5] In response to CNN's Petition for *Certiorari* in this case, the Bergers filed a Conditional Cross-Petition for *Certiorari*, No. 98-38, challenging the Ninth Circuit's holdings on the latter two issues. This Court denied the Cross-Petition on November 2, 1998. 119 S. Ct. 403.

privacy expectation must yield. The Bergers assert a privacy interest in preventing publicity about the execution of the warrants. In essence, they claim that the FWS agents' execution of warrants inherently is a private event that the news media—and thus the public—may not witness without violating the Bergers' Fourth Amendment rights. In direct conflict with the Bergers' asserted privacy interest in keeping shrouded the execution of the warrants are the significant public interests served by the agents' grant of permission to the news media: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police. Because here these important public interests in exposing government conduct to public scrutiny outweigh the Bergers' privacy interest, the grant of access to the news media was not unreasonable and the decision of the Ninth Circuit to the contrary should be reversed.

ARGUMENT

I. THE LAW ENFORCEMENT GRANT OF PERMISSION TO CNN TO OBSERVE THE EXECUTION OF THE WARRANTS AND CNN'S OBSERVATION WAS NOT A "SEARCH" OR "SEIZURE" PROSCRIBED BY THE FOURTH AMENDMENT.

Enacted to guard individuals against the exercise of unchecked government power, the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Place*, 462 U.S. 696, 706-07 (1983) (internal quotation marks and citation omitted); *accord Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978) ("[T]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.") (internal quotation marks and citations omitted). The benchmark of Fourth Amendment jurisprudence is the protection of an expectation of privacy

"that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *accord Maryland v. Macon*, 472 U.S. 463, 469 (1985); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Consequently, where an expectation of privacy is not recognized as reasonable, as here, the prerequisite "search" or "seizure" does not occur.

A. The Presence of CNN During the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Recording of Consensual Conversations Between the Bergers and Two Agents Did Not Violate an Expectation of Privacy Recognized by the Fourth Amendment.

The Fourth Amendment proscribes unreasonable "searches." "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Macon*, 472 U.S. at 469 (internal quotation marks and citation omitted); *accord Smith v. Maryland*, 442 U.S. 735, 740 (1979). Here, the Bergers have alleged an expectation of privacy in their outbuildings and fields, in Mr. Berger's presence on a county road, and in the brief consensual conversations they had with Agent Scrafford in Berger's truck and with Agents Scrafford and Branzell in the house. J.A. 57, 59-61: ¶¶ 57, 63, 65, 67, 72. Because there is no constitutionally protected privacy interest in ranchlands, outbuildings, or county roads,[6] nor

[6] There is no reasonable expectation of privacy in that which is visible from public roads and other public vantage points. *See California v. Ciraolo*, 476 U.S. 207 (1986) (observation from helicopter of activities occurring on curtilage of private residence not search because homeowner has no reasonable expectation of privacy from aerial observation); *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."); *State v. Dickerson*, 313 N.W.2d 526, 532 (Iowa 1981) (where farmhouse was exposed to public view from highway, officers had right to go to door where visitors logically would knock to seek entrance and the "situation is not changed

in voluntary conversations with law enforcement officers, the Bergers' expectation of privacy is not reasonable.

The Fourth Amendment protects only those areas which harbor the intimate activity associated with "the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). It protects "persons, houses, papers, and effects." *Oliver v. United States*, 466 U.S. 170, 176 (1984) (internal quotation marks and citation omitted). Only the curtilage—the land immediately surrounding and associated with the home—warrants Fourth Amendment protections that attach to the home. *Id.* at 180. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo*, 476 U.S. at 212-13.

In contrast, this Court long has held that "no expectation of privacy legitimately attaches to open fields." *Oliver*, 466 U.S. at 180; *accord United States v. Knotts*, 460 U.S. 276, 282 (1983) ("[N]o such expectation of privacy extended . . . outside the cabin in the open fields.") (internal quotation marks and citation omitted); *Hester v. United States*, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.") (citation omitted). " '[O]pen fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver*, 466 U.S. at 180 n.11.

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by the photographing" of what could be seen from such vantage point); *Mark v. Seattle Times*, 635 P.2d 1081, 1095 (Wash. 1981) (television crew that filmed plaintiff by placing camera on building's front window did not invade plaintiff's privacy, because window was publicly accessible).

In determining whether the Bergers' sheds and ranchlands are within the protected curtilage of the home, the Court examines: (1) the proximity of the area to the house; (2) whether the area is included within an enclosure surrounding the home; (3) the nature and use of the area; and (4) its visibility. *United States v. Dunn*, 480 U.S. 294, 301 (1987). First, the outbuildings and fields searched by the agents—and observed and videotaped by the CNN reporters, R. 8/8, tapes 6-13, 20-22—are not "immediately surrounding and associated with the home." *Oliver*, 466 U.S. at 180.[7] Second, though the perimeter of the Bergers' ranch is fenced, the outbuildings are not included within an internal fenced-in area surrounding the house. R. 8/8; *see United States v. Ishmael*, 48 F.3d 850, 857 & n.7 (5th Cir. 1995) (steel building 200 to 300 yards from mobile home and not enclosed within fence that also surrounded home was beyond curtilage); *Brady*, 993 F.2d at 178 (building not within curtilage where fence surrounded entire property but building and house were not further enclosed within single fenced-in area); *United States v. Traynor*, 990 F.2d 1153, 1158 (9th Cir. 1993) (same). Third, the Bergers used the sheds for storage of ranch equipment and effects, including poison. J.A. 94 ¶ 10; *see Brady*, 993 F.2d at 178-79 (outbuilding not protected by Fourth Amendment where it was primarily used as marijuana growing operation, even though some evidence suggested outbuilding also used to store personal property and as play area for children). They did not lock the shed door, R. 8/8, tape 7, page 17,

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[7] *Accord United States v. Redmon*, 138 F.3d 1109, 1114 (7th Cir. 1998) (no reasonable expectation of privacy in garbage cans left in driveway of townhouse), *petition for cert. filed*, 67 U.S.L.W. 3149 (June 8, 1998) (No. 98-243); *United States v. Brady*, 993 F.2d 177 (9th Cir. 1993) (outbuilding not within curtilage); *United States v. Calabrese*, 825 F.2d 1342, 1350 (9th Cir. 1987) (building 50 feet from house outside curtilage).

the ranch hands had access to the shed, *id.*, and the shed did not contain personal or intimate possessions. J.A. 94 ¶ 10; R. 8/8, tape 10, page 1; R. 8/8, tape 21, page 3; R. 8/8, tape 22, pages 4-5. *Compare United States v. Van Damme*, 48 F.3d 461, 465 (9th Cir. 1995) (greenhouses "entirely separate from the places of intimate activity associated with the home" are outside curtilage, so "Fourth Amendment did not entitle Van Damme to privacy from the observation"), *with United States v. Santa Maria*, 15 F.3d 879, 883 (9th Cir. 1994) (reasonable expectation of privacy in trailer outside home's curtilage where trailer was near home, was locked, and contained personal belongings). Finally, the Bergers' sheds are visible from the surrounding open fields. R. 8/8; *Brady*, 993 F.2d at 179.

Outbuildings like those on the Bergers' ranch that are physically separated from the house, not used for intimate activities of the home, and unprotected from observation by others, are beyond the curtilage of the home and, thus, not subject to Fourth Amendment protection. *Dunn*, 480 U.S. at 301, 302-03 (finding "little difficulty in concluding that this area lay outside the curtilage of the ranch house" where respondent's barn stood several dozen yards away from house on distinct portion of ranch, did not involve intimate activities of home, and remained unprotected from observation by others standing in open fields).[8] The Ninth Circuit acknowledged that the Fourth Amendment would *not* have proscribed a warrantless search by the FWS agents of the Bergers' ranchlands or outbuildings,

[8] *See, e.g., United States v. Rapanos*, 115 F.3d 367, 372-73 (6th Cir.) (175 acres of wetlands bordered by two highways was open field despite presence of locked gated entrance), *cert. denied*, 118 S. Ct. 304 (1997); *United States v. McKeever*, 5 F.3d 863, 867 (5th Cir. 1993) (brush 35 to 50 feet from house containing buckets of marijuana plants beyond curtilage).

Pet. App. 14a, recognizing *ipso facto* that the Bergers' expectation of privacy in the area outside their home's curtilage is not constitutionally reasonable. However, despite the absence of any recognized Fourth Amendment interest in the Bergers' ranchlands and outbuildings, the Ninth Circuit held that the Bergers' Fourth Amendment rights *were* violated when the agents authorized CNN to observe the open fields search. Plainly, though, no matter what the conduct at issue, the Fourth Amendment is not violated where it does not apply. *Minnesota v. Carter*, 119 S. Ct. 469, 474 (1998) ("Because we conclude that respondents had no legitimate expectation of privacy in the apartment, *we need not decide whether the police officer's observation constituted a 'search.'*") (emphasis added); *United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (if expectation of privacy is not reasonable, there can be "no fourth amendment violation regardless of the nature of the search").

The Ninth Circuit's irreconcilable holding was driven in part by its conclusion that the journalists were "trespassers."[9] Pet. App. 14a ("The open fields doctrine is

[9] Also, the Ninth Circuit found *"there is evidence in the record* that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that *they were located close to the house and guarded by a dog.*" Pet. App. 14a (emphasis added). However, *nothing* in the record supports either of these factual conclusions of the Court of Appeals, nor, for that matter, did the Bergers present the court with any such record support. In fact, the only reference in the record to a guard dog was the statement made the day *before* the search by one of the FWS agents who thought there might be a dog at the Berger ranch. R. 8/8, tape 4, page 5. The record demonstrates that *during the search* the Bergers' dog roamed freely, was well-behaved and friendly. R. 8/8, tape 7, pages 1-2; R. 8/8, tape 9, page 3; R. 8/8, tape 7, page 15; R. 8/8, tape 8, page 9.

not a license for the police to bring trespassers on to private property."); *id.* ("The officers would not have reasonably believed . . . that the open fields doctrine authorized third parties to trespass."). However, this Court has made evident that "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183-84; *accord Bivens*, 403 U.S. at 393-94 ("[O]ur recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws.") (citing *Katz*, 389 U.S. 347; *Berger v. New York*, 388 U.S. 41 (1967); *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Thus, the fact that the CNN reporters may have been trespassing has no bearing in the determination of whether the Fourth Amendment was violated.[10]

The Ninth Circuit also based its open fields holding on its erroneous conclusions that the agent's grant of permission to CNN to observe the warrant "has no law enforcement purpose." Pet. App. 14a. Consideration of law enforcement purposes, however, is relevant *only* upon a determination that the Fourth Amendment applies *in the first instance* and, thus, that the reasonableness balance must be struck. *See Carter*, 119 S. Ct. at 474. In any event, as discussed below, there were ample law enforcement interests served through the grant of access to CNN.

Also, the Bergers claim that they had an objectively reasonable expectation of privacy in the consensual conversations Mr. Berger had with Agents Scrafford and Branzell after he invited them into his truck and home; that is, an expectation of privacy in *voluntary conversations with law enforcement officers whom he knew were*

[10] Moreover, the Bergers will have the opportunity to litigate their state law trespass claim against CNN in the district court.

on his property to execute warrants. However, it is well established that a person has no constitutionally recognized privacy interest in conversations with law enforcement officers or agents, even where the speaker is *unaware* he is talking to one. *Lopez v. United States*, 373 U.S. 427, 438 (1963) (Where officer wore hidden microphone and was present at the invitation of the defendant, there would be no suppression of "statements made by [the defendant] to [the officer], statements which [the defendant] knew full well could be used against him by [the officer] if he wished."); *United States v. White*, 401 U.S. 745, 749 (1971) (under *Katz*, a defendant does *not* have "a justifiable and constitutionally protected expectation that [the] person with whom he is conversing will not then or later reveal the conversation"); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("[I]t is evident that no interest legitimately protected by the Fourth Amendment is involved" where law enforcement informant "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.").

Completely disregarding such precedent, the Ninth Circuit held that "the Bergers *had* an expectation of privacy in their conversations with Agent Scrafford." Pet. App. 17a (emphasis added). Further, the court held that this privacy interest was infringed by the audio recording of the conversations. *Id.* This holding was in error, for:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent *or by others* from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

White, 401 U.S. at 751 (emphasis added).

The basis for the Ninth Circuit's rejection of the invited informer doctrine of *Lopez*, *White*, and *Hoffa* was its conclusion that the recording of the Bergers' conversations with the agents "was not done for a legitimate law enforcement purpose." Pet. App. 15a-16a. However, as *Lopez*, *White*, and *Hoffa* demonstrate, the concern of the invited informer doctrine is the *reasonableness* of the privacy expectation, *not* the law enforcement agents' *motives*. Again, where the expectation of privacy is not reasonable in the first instance, there can be "no fourth amendment violation regardless of the nature" of the conduct. *Taketa*, 923 F.2d at 672; *accord Carter*, 119 S. Ct. at 474. The Ninth Circuit's conclusion that the subject of a search warrant has *any* reasonable privacy expectation in consensual conversations held with the serving law enforcement officers is both untenable and unprecedented.

Consequently, a subjective expectation that a consensual conversation with a law enforcement officer during the execution of a search warrant is private cannot be considered reasonable. It also is not reasonable to expect that details concerning a government search of a 75,000-acre ranch and its outbuildings for evidence of the poisoning of endangered wildlife will be kept private. The FWS agents could have searched these areas without the benefit of a warrant, as in *Dunn*,[11] and their determination to grant CNN permission to observe the search should fare no worse.

B. The Agents' Grant of Permission to CNN to Videotape the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Resulting Videotaping Were Not a Fourth Amendment "Seizure."

Although the Bergers did not have a constitutionally recognized expectation of privacy in their fields and outbuildings, they claim that CNN's videotaping of those

[11] Magistrate Judge Richard W. Anderson who presided over the criminal case against Mr. Berger, specifically so held. R. 5, Ex. G.

areas—in and of itself—was an unconstitutional "seizure." A seizure occurs, however, when there is a "meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The videotaping of the Bergers on their ranch and of their fields and outbuildings did not interfere in any way with the Bergers' possession of their property. *See Arizona v. Hicks*, 480 U.S. 321, 324 (1987) ("[T]he mere recording of the serial numbers [on the suspected stolen stereo components] did not constitute a seizure. . . . In and of itself . . . it did not 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure."); *Wilson v. Layne*, 141 F.3d 111, 115 (4th Cir.) (en banc) ("the reporters' photographs of the events did not amount to a seizure"), *cert. granted in part*, 119 S. Ct. 443 (1998). Finally, because CNN's presence on the Bergers' open fields did not violate the Fourth Amendment, its videotaping of what they saw also did not. *See Sallie v. North Carolina*, 587 F.2d 636, 641 (4th Cir. 1978) (where officer's presence was not proscribed by Fourth Amendment, his use of photographic equipment to record what he saw was not either); *United States v. Ludwig*, 902 F. Supp. 121, 125 (W.D. Tex. 1995) (same); *Schultz v. State*, 593 P.2d 640 (Alaska 1979) (same); *State v. Magnano*, 528 A.2d 760, 764 (Conn. 1987) (same); *Dickerson*, 313 N.W.2d at 532 (same); *People v. Maltese*, 540 N.Y.S.2d 817 (N.Y. App. Div. 1989) (same); *State v. Louis*, 672 P.2d 708, 710-11 (Or. 1983) (same); *Dubbs v. State*, 157 S.W.2d 643 (Tex. Crim. App. 1942) (same).

II. EVEN IF THE FOURTH AMENDMENT APPLIES TO THE BERGERS' FIELDS, OUTBUILDINGS, AND CONSENSUAL CONVERSATIONS WITH FWS AGENTS, THE EXPECTATION OF PRIVACY IN PREVENTING ANY INCREMENTAL STIGMA CAUSED BY PUBLICITY OF THE SEARCH SHOULD YIELD TO THE IMPORTANT LAW ENFORCEMENT INTERESTS SERVED THROUGH THE AGENTS' GRANT OF ACCESS TO CNN.

While recognizing the great value of protecting the individual's privacy in his or her home, "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Terry*, 392 U.S. at 9; *accord Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures."); *Schmerber v. California*, 384 U.S. 757, 768 (1966) ("the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner").

Consequently, the reasonablenes of an intrusion upon asserted Fourth Amendment privacy interests is examined in light of "all the circumstances." *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997); *United States v. Chadwick*, 433 U.S. 1, 9 (1977). The right of privacy asserted must be balanced against the public interest served by the challenged conduct. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.").[12] The inquiry, inherently, is fact-specific and

[12] *See also Michigan v. Summers*, 452 U.S. 692, 700-03 n.12 (1981) ("[T]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.") (internal quotation marks and citation omitted); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) ("Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.") (internal quotation marks and citation omitted).

does not lend itself to absolute or rigid rules. *Harris v. United States*, 331 U.S. 145, 150 (1947). "[T]here is no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Buie*, 494 U.S. at 332 (internal quotation marks and citations omitted); *accord Terry*, 392 U.S. at 9 ("[T]he specific content and incidents of this right must be shaped by the context in which it is asserted.").

We deal here with a judicial officer's antecedent finding of probable cause to believe a crime has been committed and his authorization to law enforcement officers to exercise the inherently coercive government power to search and seize. Against this backdrop, the public interests served by the law enforcement grant of permission to journalists to witness a warrant execution are substantial: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police. In contrast, the Bergers assert a privacy interest in preventing public scrutiny of the FWS agents' search for evidence that Mr. Berger was poisoning eagles and any resulting incremental embarrassment. Given public interests of great import to a democratic society, an asserted privacy interest which is not of constitutional magnitude, and the incremental impact of the challenged conduct on the privacy interest asserted, the Fourth Amendment balance here soundly favors access to the news media as surrogate for the public.

A. The Government Interests Served by the FWS Grant of Permission to CNN To Observe the Execution of the Warrants Are Significant.

Under the Fourth Amendment balance of interests, the Court "consider[s] first the nature and extent of the governmental interests involved." *Terry*, 392 U.S. at 22.

"The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule . . . that ignores countervailing law enforcement interests." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (refusing to require announcement of officer's presence in all cases prior to warrant execution; reasonableness of failure to announce to be evaluated in each case). "Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

Here, law enforcement's grant of permission to CNN to observe the warrant execution served three essential public interests: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police.[13] The Fourth Amendment, of course, does not preclude the accomplishment of law enforcement interests through the aid of civilians.[14] This

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[13] The Fourth Amendment reasonableness balance is not concerned with the subjective intent of the specific law enforcement officers involved. *See Whren v. United States*, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."); *Horton v. California*, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."); *Brower v. County of Inyo*, 489 U.S. 593, 598, 600 (1989) (refusing to inquire into subjective intent of law enforcement officers in erecting roadblock in case alleging unreasonable seizure of driver who died when he crashed into it).

[14] *See, e.g., United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (officers could bring with them telephone company employee to identify stolen telephone company property not listed in warrant); *State v. Scigliano*, 583 P.2d 893 (Ariz. 1978) (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *State v. Superior Court of Marin County*, 598 P.2d 877 (Cal. 1979) (robbery victim could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *People v. Boyd*, 474 N.Y.S.2d 661 (N.Y. Sup. Ct. 1984) (burglary victim may accompany law enforcement officers in executing valid search warrant to identify stolen property); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (same); *Huggins v. State*, 861 P.2d 1007 (Okla. Ct. App. 1993) (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property).

is equally true in circumstances where the neutrality of the civilian—here, the journalists—plays a central role in the accomplishment of the law enforcement interests. *Cf. United States v. Stegmaier*, 397 F. Supp. 611 (E.D. Pa. 1975) (Fourth Amendment not violated when officer entered hotel room in pursuit of individual suspected of stealing American Express traveler's checks while accompanied by American Express representative who, acting solely on behalf of American Express, located checks in plain view in room; checks not suppressed), *aff'd*, 538 F.2d 321 (3d Cir. 1976).

Judge Murnaghan, dissenting in *Wilson v. Layne*, submits that "if photographs had been reasonably necessary to accomplish the purpose of the warrant, . . . the police could have brought along a camera and snapped a picture themselves." 141 F.3d at 120 n.3 (Murnaghan, J., dissenting). However, it is not constitutionally unreasonable to conclude that a still or video camera operated by a neutral news media observer will effectuate the law enforcement interests in government oversight and prevention of police misconduct much more effectively than one wielded by a police officer. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the

discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . . ."). Moreover, even as to those law enforcement interests that also might be served by a law enforcement camera crew, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

We address in turn the law enforcement interests served by the FWS grant of access to CNN.

1. ***Informing the Public About the Performance of Inherently Coercive Government Functions Is a Public Interest of Great Import and a Duty of Law Enforcement.***

The news media's ability to report—independently and directly, without the need to rely on law enforcement spokespersons as filters—on the government's exercise of Fourth Amendment power serves important interests accomplished through every grant of access to government action and decision-making: increased public understanding of the operation of a vital government function, public oversight of government and the criminal justice system, and promotion of the appearance of fairness.[15] It is self-evident in our "open society" that people "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Thus, it is axiomatic that public access to information about the exercise of government powers and responsibilities is material "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the gover-

[15] The effect of media scrutiny on the accomplishment of actual fairness is addressed *infra* section II.A.3.

nors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (discussing disclosure requirement in Freedom of Information Act context).[16] Indeed,

> the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena . . . .

Richmond Newspapers, 448 U.S. at 604 (Blackmun, J., concurring). It is in the name of such First Amendment-based interests that the news media is accorded its unique role in the Constitution. "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

The interest of the public in knowing what its law enforcement instruments are doing is accomplished, in

[16] *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (acknowledging value of openness of court proceedings to give "assurance that established procedures are being followed and that deviations will become known" and to enhance "basic fairness" of proceedings and "appearance of fairness so essential to public confidence in the system . . . a community therapeutic value"); *In re Oliver*, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."); *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) (Absence of public scrutiny "breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law" and, consequently, access to the workings of the criminal justice system "is essential . . . to achieve the objective of maintaining public confidence in the administration of justice.").

large measure, through direct news media access to the exercise of government power. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . ."); *cf. Richmond Newspapers*, 448 U.S. at 572-73 (recognizing that journalists "function[] as surrogates for the public"). As was recently emphasized in *Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997), this is no less true in the case of law enforcement investigations. In *Reeves*, the police entered a suspect's home with his consent and accompanied by reporters who videotaped his subsequent arrest. The court rejected plaintiff's common law claims based on the videotaping and subsequent broadcast because the "facts published in the broadcast concern a matter of legitimate public concern." *Id.* at 709. "Arrests and police investigation of violent crimes are matters of legitimate public interest. . . . Clearly, the Cleveland Police Department's response to a call regarding a violent crime, their investigation and arrest of a suspect are all matters of legitimate public concern." *Id.*

The flip side of the coin is the duty of law enforcement agencies to ensure close public scrutiny of their work.

> Police agencies have a responsibility to keep the public informed of their activities, through the news media as well as through other channels. Public apathy toward the police in particular or toward government in general is usually fed by a lack of public knowledge and understanding of the functions of the police. This can be very damaging to the effectiveness of the police agency, which must rely continually upon the public for support.

Charles D. Hale, *Police Patrol* 215-16 (1981).[17] "Crime, its results, and the efforts to combat it are all matters of continuing public concern" and the "press serves the public by supplying needed information, by stimulating thought, and by providing a medium for expression." *Manual of the Los Angeles Police Department* § 420.10 (1992).

The fact that the news media and law enforcement agencies share a common institutional interest in promoting public scrutiny of law enforcement conduct—or that other law enforcement interests also are served thereby, *see infra* sections II.A.2, 3—does not make journalists *agents* of the police.[18] Rather, the law enforcement interest is served

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[17] *See also Buckly v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job . . . ."); *Brown v. Reno*, 584 F. Supp. 504, 505 (S.D. Fla. 1984) (State Attorney's press releases announcing the audit of a community activist's use of public funds was "well within the scope of [her] quasi-judicial function"); *Gockley v. VanHoove*, 409 F. Supp. 645, 650 (E.D. Pa. 1976) ("[I]t is within the jurisdiction of the prosecutor to release information to the public or press relating to investigations or indictments."); *Sims v. Barnes*, 689 N.E.2d 734, 736 (Ind. Ct. App. 1997) ("[T]he prosecuting attorney is duty-bound to keep the public informed as to the activities of his office. . . . [I]t is a prosecutor's duty to inform the public as to his investigative, administrative and prosecutorial activities . . . ." (internal quotation marks and citation omitted), *review denied*, 698 N.E.2d 1191 (Ind. 1998); *Oden v. Reader*, 935 S.W.2d 470, 476 (Tex. App. 1996) (prosecutor obligated to make statements to the press by statute requiring state attorneys to " 'afford the public the benefit of a free press' "; "statements to the press may be an integral part of a prosecutor's job and may serve a vital function") (quoting Tex. Code Crim. Proc. Ann. Art. 2.03(b) (Vernon 1977)); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 Modern Policing 231, 255 (Michael Tonry & Norval Morris eds. 1992) (publicity given to successful police operations "can often translate into a range of tangible benefits, including greater public cooperation with police and better fiscal support from local, state, and national funding sources").

[18] The *Berger* panel failed to recognize that, without running afoul of the Fourth Amendment, CNN's presence could accomplish

through an independent news media and, thereby, public assurance that the news media is not merely a spokesman for the government. In any event, journalists serve their function of reporting news to the public irrespective of the concurrent interests sought to be served by law enforcement agents through a grant of access.

While media access to the execution of a warrant only may be had through a grant of permission from the law enforcement agency, there also is inherent institutional antagonism between the news media and the government upon which it reports. *See Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970) ("[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation."); *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971) ("[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice."). The nature of the relationship between the independent news media and law enforcement is reflected in the CNN letter to A.U.S.A. McLean confirming the official grant of permission for CNN to accompany the FWS agents while explicitly reserving to CNN exclusive editorial control over the substance of its reporting.

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the duty of the FWS agents to allow public scrutiny of their conduct *while at the same time* accomplishing CNN's mission of keeping the public informed. Pet. App. 10a-11a. ("This search stands out as one that at all times was intended to serve a major purpose other than law enforcement."; "no circuit decision has ever upheld the constitutionality of a warranted search where the broadcast media were present to document the incident for non-law enforcement purposes").

Consequently, the determination of the FWS agents to permit journalists to observe and videotape the Berger search accomplished the vital law enforcement duty of informing the public of the investigation of federal crimes against wildlife. *See Wilson v. Layne*, 141 F.3d at 118 (noting that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest").

2. *Informing the Public About Law Enforcement Efforts to Discover and Investigate Crime Is a Critical Tool in Deterring Future Crimes.*

Public understanding of what behavior may be criminal and public perception that criminals will be apprehended and punished is essential to effective law enforcement and is effectuated in large measure through media reports. "If a given policy is to have a deterrent effect, offenders and potential offenders need, by definition, to know what that policy is." David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449, 463 (1997). Accurate communication of this information particularly is necessary where law enforcement objectives are not understood or popularly supported, as is the case with crimes against endangered wildlife in many western communities.[19]

> Public support is essential to the successful accomplishment of the police purpose. It is difficult and sometimes nearly impossible to enforce laws that are

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[19] *See, e.g.*, R. 8/8, tape 11, page 3 (A.U.S.A. McLean explained: "The hardest part, I think—we try our cases in Montana, so our juries are selected from the West, and . . . the hardest thing you have to get over is . . ., you have to convince the jury, that, . . . this type of crime . . . deserves a conviction. A lot of them have sympathy for these ranchers because, . . . they're home-town people.").

> not popular with the majority of the people. We should recognize that a public that observes police laws and complies with regulations relieves the police of a large share of their burden. Difficult programs can be carried out with strong public and community support . . . .

Harold Barney, *Community Relations, in Some Concepts of Administrative Training* 69 (Police Management Institute 1969).[20] Correspondingly,

> for an enforcement project to get the maximum deterrence factor, the public must realize enforcement is ongoing and violators are being arrested. The high visibility of police officers in a designated area emphasizes police presence, thus increasing the public's perception of risk of arrest.

Wiliam P. Georges, *DWI Blanket Patrol: An Innovative, Effective Approach,* The Police Chief, Nov. 1992, at 56.[21]

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[20] Public knowledge about the nature of direct interactions between law enforcement agents and the public and how agents comport themselves—particularly during the coercive exercise of Fourth Amendment power—is important to securing public support of the law enforcement mission. *See* R. Bruce Holmgren, *Primary Police Functions* 2 (1960) ("[I]n a democracy those charged with law enforcement have to win that enforcement. This means they have to win, even earn, or inspire, compliance of the public with a host of laws, ordinances and regulations. This is something voluntary. No police agency can win compliance by force. How they do it is by developing voluntary compliance. In short, you sell the people the idea that they should conform.").

[21] *See also Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (It was the duty of an IRS investigator "to inform the public about tax and other cases in which the IRS was involved in order to deter violations of the law and to instill public confidence that the IRS prosecuted violators."); Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909, 923 (1996) ("the deterrent value of a successful and publicized sting operation is inestimable" because "[i]ndividuals contemplating the commission of an environmental crime in a particular community

Providing the news media—and through the media, the public—access to criminal enforcement efforts is material to the law enforcement deterrence goal. Thus, the Ohio Court of Appeals, in rejecting the claim that the plaintiff's Fourth Amendment rights were violated by the presence of reporters and photographers at the sobriety checkpoint where he was arrested for drunk driving, explained:

> In light of the state's notable interest in raising public awareness of drunk driving as a means of ameliorating its lethal effects, the public nature of arrests and crime prevention, and the absence of any facts establishing that the media presence created a spectacle or circus atmosphere, we cannot conclude that the media's recording of lawful acts of the police rendered those acts unconstitutional.

State v. Eggleston, 671 N.E.2d 1325, 1332 (Ohio Ct. App. 1996). Furthermore, this Court's Fourth Amendment inquiry does not require eventual arrest or conviction to establish the importance of the law enforcement interest in deterrence served in the first instance by permitting the news media to observe warant executions. *See, e.g., Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoints as effective deterrent though they resulted in drunk driving arrests of

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may change their minds" if publicity makes clear that they may be dealing with undercover officers or that their illegal actions may be videotaped); Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679, 687 (1997) (FTC increasingly relies on highly publicized enforcement "sweeps" targeting single type of illegal activity which "results in greater publicity for law enforcement actions that, in turn, increases consumer awareness of fraud and deters fraudulent marketers"); *The Relative Merits of Unmarked vs. Marked Patrol Cars*, The Police Chief, July 1996, at 55, 56-57 ("[T]he more visible police officers are as they go about their everyday duties, the greater the opportunity to create an impression of omnipresence and the more they are likely to slow down speeders and deter both traffic and criminal violations.").

only 1% of all motorists stopped); *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976) (sustaining constitutionality of San Clemente checkpoint for illegal aliens when aliens were found in only 0.12% of vehicles passing through checkpoint).

The law enforcement goal of maximizing the deterrent effect of limited resources through publicity of enforcement and investigation efforts is sound. *Cf. Sitz*, 496 U.S. at 453-54 (deferring to law enforcement choices between reasonably alternative techniques because government officials "have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers"). Therefore, the government interest in "publiciz[ing] its efforts to combat . . . crime," Pet. App. 4a, served by the FWS agents' grant of permission to CNN to witness the warrant executions, merits great weight.

3. *The Presence of Reporters as Witnesses to the Execution of Warrants Reduces the Prospect of Police Misconduct and Promotes Officer Safety.*

Deterring police misconduct and protecting officer safety during the exercise of coercive government power are matters of undeniable consequence [22] and the presence of the news media also can aid in achieving these public interests. Police misconduct, for one, may occur in the absence of public oversight. As a cursory read of any newspaper will demonstrate, allegations of abuse of police power in the United States regrettably are not uncommon. In fact,

> [p]olice abuse remains one of the most serious and divisive human rights violations in the United States. The excessive use of force by police officers, including unjustified shootings, severe beatings, fatal chokings, and rough treatment, persists because overwhelming barriers to accountability make it possible for officers who commit human rights violations to escape due punishment and often to repeat their offenses.

Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* 25 (1998). Serious complaints may be dismissed by law enforcement agencies because they involve the word of a suspect against the word of the officers.[23] However, in its recent report, Human Rights Watch recognizes that "[t]he media can provide a degree of external monitoring. Extensive investigative articles and consistent reporting when abuses arise have played a central role in generating pressure for reforms." *Id.* at 61. *See, e.g., Reeves*, 983 F. Supp. at 713 n.8 (news media accompanied police officers in a consensual entry into suspect's home and videotaped subsequent arrest; suspect acknowledged later that "he

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[22] *See, e.g., Terry*, 392 U.S. at 12 (purpose of exclusionary rule is to discourage lawless police conduct); *Knowles v. Iowa*, 119 S. Ct. 484, 487 (1998) ("We have recognized that the . . . rationale [of] officer safety [] is both legitimate and weighty.") (internal quotation marks and citation omitted).

[23] *Compare Shielded From Justice* at 323 (a police officer who eventually pled guilty to robbery, obstruction of justice and conspiracy to violate civil rights explained: "I never feared an [internal police] investigation. . . . [T]he way things were done, I mean, unless there is [sic] a whole lot of witnesses against you and a whole lot of pressure, you're not ever going to get found guilty of anything."), *and id.* 130 ("One of the officers was the subject of five brutality complaints. One complainant alleged that the officer and his partner drove him to a deserted location where the officer reportedly unzipped the man's pants and his partner grabbed the suspect's testicles and squeezed while asking questions; the officers also reportedly kicked and choked the man. Despite similar complaints by other suspects, [the Atlanta Police Department] dismissed all five complaints as unfounded because there were no witnesses other than police officers, who backed the officer.") (footnotes omitted), *with id.* at 137 ("Roderick Stewart reportedly sustained a black eye and other injuries after Atlanta police officers stopped his vehicle . . . following a two-mile chase, because they suspected he was driving under the influence of alcohol. . . . The unusual aspect of this case was that the alleged beating was videotaped by cameras mounted on the police vehicles. After viewing the tape, then-Police Chief Eldrin Bell stated, 'The tape shows excessive force was used.' ").

thought he would be better off with the camera recording the encounter").

By the same token, the presence of independent journalists may serve as a restraint on the suspect's behavior during the law enforcement encounter, *see Wilson v. Layne*, 141 F.3d at 118 ("reasonable officers may have believed that *the obvious increase to their safety afforded by the presence of the reporters* constituted a legitimate law enforcement purpose") (emphasis added), and, subsequently, prevent baseless claims of police misconduct. *Cf. Ayeni*, 35 F.3d at 688 ("The Government makes no claim that the search was being videotaped for legitimate law enforcement purposes, such as . . . to refute claims of improper conduct by the agents during the search."). As this Court recognized thirty years ago, "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Terry*, 392 U.S. at 23 (holding officer may search suspect to determine whether he is carrying weapon without probable cause). "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.*

B. The Asserted Interest In Automatically Shielding Law Enforcement Action From Public Exposure is Anathema to Our Democratic System.

In performing the Fourth Amendment balance, the Court next must consider "the nature and quality of the intrusion on individual rights" affected by the conduct at issue. *Id.* at 24. The starting point is the context in which the plaintiff's asserted privacy expectation is claimed. *Id.* at 9. Here, that is the execution of a search warrant, not a private event. As a matter of fact, searches commonly are highly visible exercises of government authority. *See, e.g., United States v. Spikes*, 158 F.3d 913, 927 (6th Cir. 1998) (referring to execution of warrant as "spectator sport" where SWAT team captain used bullhorn to announce that police were executing warrant, members of SWAT team shouted same message as they charged front porch, and "neighbors had already exited their homes to observe the execution of the warrant before the police made their entry into the residence").[24]

It is in the context of this exercise of government authority that the Bergers claim an interest in preventing news media access that may lead to publicity about the facts surrounding the officers' execution of the warrants

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[24] *See also* Shannon McCaffrey, *Man Linked to Eight Killings*, Associated Press Online, Sept. 3, 1998 (crowd of 100 people watched police remove three dead bodies from home during execution of search warrant in New York); Bruno Tedeschi & David Voreacos, *Chemical Site Raided: Agents Seize Substances, Documents*, Bergen County Record, July 22, 1998, at A1 (nearby residents looked on as government agents arrived in 25 vehicles, sealed off the avenue with police barricades, and executed search warrant on chemical company in New Jersey); Leanora Minai, *Police Say They Were Rready This Time*, St. Petersburg Times, Apr. 25, 1998, at 1B (crowd of 20 to 30 gathered in street as 15 to 20 undercover narcotics detectives executed search warrant at alleged crack house in predominantly African-American Florida neighborhood); Kim Williams-Neil, *4 Men Arrested in Drug Raid*, Montgomery Advertiser, Jan. 31, 1998, at 1C (crowds of onlookers watched as officers swarmed around Alabama house to execute search warrant for narcotics and masked officers formed human barriers to prevent vehicular and pedestrian traffic on street); Terri Somers & Stephanie Hoo, *2 Policeman, Civilian Shot in City*, Asbury *Park Press*, Nov. 9, 1997, at 1 (crowds gathered behind trees and on porches up and down avenue when police exchanged gunfire with residents of suspected drug house during execution of search warrant in New Jersey); Judith Gaines & David Armstrong, *Police Say They're Close to Finding Woman; DA 'Pessimistic' Missing Reading Nurse Is Still Alive*, The Boston Globe, Oct. 18, 1997, at B1 (police armed with shovels and dogs executed search warrant in house and nearby woods, drawing crowd at 6 a.m.); Keven Simpson, *'Crackhouse' Raid Yields Four Arrests in Bloomington; Apartment Filthy, Children Go Into Protective Custody*, Bloomington Pantagraph, Oct. 4, 1997, at A6 (commotion and flashing police lights brought many neighbors to their windows or curbs during execution of search warrant at Illinois drug house).

and in preventing any resulting incremental embarrassment.[25] However, in the circumstances presented, the subjective privacy expectation asserted is not an interest meriting *constitutional* recognition or protection.[26]

The Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), is instructive in this regard. Edward Davis was arrested in Louisville, Kentucky in 1971 on a charge of shoplifting. He pled not guilty and the charge was filed with leave to reinstate, leaving it outstanding. *Id.* at 695-96. In late 1972, Chief Paul of the Louisville Police Department distributed flyers to local merchants warning about active shoplifters in the area. Davis' name and photograph were included on the flyer. He alleged in a suit pursuant to 42 U.S.C. § 1983 that Paul defamed him in violation of the Fourtenth Amendment. The Court rejected his argument that he was deprived of a "liberty" interest protected by the Due Process Clause. *Paul*, 424 U.S. at 712. Davis further argued that Paul deprived him of a " 'right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendment.' " *Id.* The Court also rejected this contention, explaining:

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead

[25] *See, e.g.*, J.A. 54 ¶ 40 ("CNN planned to use the . . . Bergers to illustrate these acts, casting them unwittingly in the role of inhumane barbarians for the purposes of broadcasting a derogatory portrayal for all the world to see."); *id.* at 64 ¶ 85 ("plaintiffs have suffered extreme distress, humiliation, anguish and embarrassment"); *id.* at 68 ¶ 105 ("plaintiffs suffered extreme indignities and humiliation[,] . . . loss of standing in the community, and have been held up to ridicule before their peers").

[26] This is not to say that legislative or common law may not afford the Bergers a remedy or proscribe the permission granted to CNN in this case by the FWS agents. *See infra* n.30.

> on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.[27]

Similarly, in *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court rejected a government employee's *Bivens*[28] claim based on defamatory statements made by his former federal employer to his current employer. Siegert alleged the defamation infringed his "liberty" interests in violation of the Fifth Amendment's Due Process Clause. Reiterating its holding in *Paul*, the Court spelled out that "[d]efamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation" despite serious impairment of Siegert's future employment opportunities. *Id.* at 233, 234. "[S]o long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action." *Id.* at 234.

The principle that the United States Constitution simply does not protect against injury to reputation alone rings all the more true when the alleged injury results from publicity about public law enforcement actions taken against an individual based on a judicial determination of probable cause to believe that evidence of a crime or a suspect will be found. *Hicks v. Cassilly*, 971 F. Supp. 956, 970 (D. Md. 1997) (rejecting plaintiffs' claims that law enforcement officers violated a constitutional right to privacy "by permitting the news media to videotape and

[27] The search of the Bergers' ranch resulted in the filing of criminal charges against Mr. Berger for violation of a federal law governing the use of pesticides, and, eventually, in his conviction. However, irrespective of a subsequent arrest or prosecution, publicity about the execution of the warrant—itself "an official act," *Paul*, 424 U.S. at 713—should not provide the basis for a constitutional claim of reputational injury.

[28] 403 U.S. 388.

photograph them [during the execution of a warrant in a bookstore], thereby causing their likenesses to be published openly to the general public" because "claims for injury to reputation do not rise to the level of constitutional torts and are not compensable under 42 U.S.C. § 1983"), *rev'd on other grounds*, 153 F.3d 720 (4th Cir. 1998); *accord Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1622 (N.D. Ohio 1984) (where news media took pictures during execution of warrant in home, court held that "absent the Moncriefs' showing something more than mere embarrassment caused by the photographs, no federally protected right or privilege has been violated"). The Fourth Amendment protects against unwarranted government intrusion, not *publicity* about warranted intrusion. *Moncrief*, 10 Media L Rep. at 1622 (The Constitution does not protect any interest in being free from unwanted publicity. "The right to be free from unwanted publicity . . . is protected, if at all, by the common law . . . .") (internal quotation marks and citation omitted).

Further, to the degree the Bergers allege a privacy interest which was invaded by the reporters' *presence* during the execution of the warrants, the incremental impact of having twenty-four people (including three journalists) instead of twenty-one (the FWS warrant execution team) witness the execution of the warrant, R. 8/7 at 27, should not impact the constitutional balance. In other words, the incremental harm of having three civilians observing what twenty-one law enforcement officers already are viewing does not outweigh the significant public interests served by the presence of neutral journalists. *Summers*, 452 U.S. at 696, 701-03 (Fourth Amendment not violated by detention without probable cause of resident during execution of search warrant since detention "was surely less intrusive than the search itself" and it "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant").

C. The Fourth Amendment Balance Weighs in Favor of Public Access Here.

"[I]n determining reasonableness, [the Court] balance[s] the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Buie*, 494 U.S. at 331 (citations omitted). Here, given an asserted privacy interest not of constitutional magnitude, vital public interests, and only incremental impact on the asserted privacy concern,[29] the Fourth Amendment balance weighs strongly in favor of the public interest.[30]

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[29] While there may be situations where the presence of the news media during the exercise of Fourth Amendment authority unduly infringes on a particularized privacy interest which outweighs the public and law enforcement interests being served by the news media's presence, the Fourth Amendment should not countenance a *per se* prohibition on a law enforcement agent's determination from case to case that the public interest will be served by the presence of a neutral journalist, as was the case here. CNN does not argue, for example, that law enforcement interests would override the privacy interests impacted during a strip or body cavity search. *See Wilson v. Layne*, 141 F.3d at 129 (Murnaghan, J., dissenting). Nor, for that matter, doe CNN suggest that it could have *conducted*—as opposed to having *observed*—a search or seizure of the Bergers' property. In contrast, the Fourth Amendment question accepted for review in this case does not necessarily presuppose entry onto private property and, consequently, would include, for example, the execution of an arrest warrant on public property where the suspect's privacy rights would be at the nadir. As always is the case when determining reasonableness under the Fourth Amendment, the context is critical and hard-and-fast rules are eschewed. *Harris*, 331 U.S. at 150; *Buie*, 494 U.S. at 332.

[30] The outcome of the Fourth Amendment inquiry does not require that federal judges seek to "encourage or condone" the law enforcement conduct at issue. *See United States v. Appelquist*, 145 F.3d 976, 979 (8th Cir. 1998) (holding that bringing journalists on private property immediately following search to videotape seized drugs does not violate Fourth Amendment while acknowledging that court does not "encourage or condone such conduct"). The constitutional equation, of course, does not preclude legislative or common law schemes proscribing behavior which satisfies the rea-

On one side of the scale is the privacy interest claimed by the Bergers and the impact of the government's conduct on such interest. They assert a privacy interest in preventing public disclosure and media observation of the otherwise reasonable execution of valid warrants. However, this interest is asserted in the wake of an inherently substantial invasion of privacy authorized by a judicial officer's determination that probable cause existed to believe Mr. Berger was illegally killing endangered wildlife. *Summers*, 452 U.S. at 701 ("Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there."). Moreover, the Bergers do not allege that the FWS agents' search, itself, exceeded the scope of the warrant, nor that CNN influenced the agents to exceed its scope. *See People v. Boyd*, 474 N.Y.S.2d at 665 (in holding Fourth Amendment not violated by police bringing along robbery victim during execution of search warrant, court noted that "[n]o word or action on [the victim's] part induced the police to extend

sonableness balancing test of the Fourth Amendment and, in fact, the Bergers have alleged trespass and intentional infliction of emotional distress claims that remain to be adjudicated and are not here at issue. J.A. 45-46 ¶ 4. *See Avenson v. Zegart*, 577 F. Supp. 958, 962 n.5 (D. Minn. 1984) (Rejecting plaintiffs' constitutional claim based on a media ride-along, the court noted that "[p]laintiffs have adequate remedies available in . . . their state law tort theories to recover any losses they might have incurred."); *Monerief*, 10 Media L. Rep. at 1621 ("Rights, privileges, and immunities not derived from the federal constitution or secured thereby are left exclusively to the protection of the states."). By the same token, the existence of tort remedies has no bearing on the Fourth Amendment determination. *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995) ("whether [the private party] was a trespasser under state law was not . . . relevant [] to [plaintiff's] claim of a constitutional violation under 42 U.S.C. §§ 1983, 1985, or 1986.").

the hunt beyond the area or the scope authorized by the issuing magistrate").

Consequently, the Bergers assert a privacy interest in governmental conduct which, inherently, is not private.[31] The stigma or embarrassment associated with being the target of a warrant—while no doubt genuine—is inherent in the warrant process, *cf. Terry*, 392 U.S. at 25 (frisk "surely" is an "annoying, frightening, and perhaps humiliating experience"), and any effect on reputational concerns caused here by allowing direct news media access to the officers' execution of the warrants merely was incremental. *See Summers*, 452 U.S. at 701, 703 ("The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself" and it "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant."); *Scigliano*, 583 P.2d at 896 ("where a valid search warrant has been acquired and was being lawfully executed, we see no greater intrusion into personal security and privacy, and hence no constitutional prohibition, in the use of the informant at the scene of the execution of the warrant"); *People v. Boyd*, 474 N.Y.S.2d at 665 (presence of victim who identified stolen property during police execution of search warrant "constituted no greater intrusion on defendants' privacy than that which had already been authorized by the issuance of the warrant").

On the other side of the Fourth Amendment scale are the interests served by the incremental intrusion on whatever

[31] In fact, the detailed affidavit in support of probable cause setting forth the basis for obtaining the warrant in the first place, the warrant itself, and the return on the warrant identifying information seized became a matter of public record one and a half weeks after the warrant was executed (and 6 months before CNN broadcast any coverage of the search). J.A. 27, 35, 43, 68 ¶ 82; R. 8/3-4.

privacy expectation the Bergers may have.[32] Here, the law enforcement interests in enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police are considerable as they facilitate important institutional law enforcement duties that extend beyond the specifics of any individual search.[33] As the vast Fourth Amendment jurisprudence of this Court makes evident, interests besides just locating evidence of crime and apprehending suspects warrant exercise of the government's Fourth Amendment power.[34]

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32 As discussed in section I, *supra*, any privacy expectation the Bergers have in their open fields and in their consensual conversations with law enforcement officers is not constitutionally reasonable.

33 CNN does not suggest here that the interest of the public in knowing about the exercise of government power necessarily would tip the Fourth Amendment balance in favor of permitting a non-media observer to accompany law enforcement officers. Implicit in the Fourth Amendment reasonableness standard is some consideration of the effectiveness of the intrusive behavior in accomplishing the legitimate law enforcement interests. *See, e.g., Brown v. Texas*, 448 U.S. 47, 51 (1979) (describing measure of effectiveness as "the degree to which the seizure advances the public interest"); *but see Sitz*, 496 U.S. at 455 (stating that Brown's effectiveness rule does not deny law enforcement officials discretion to choose among reasonable, not necessarily most effective, alternatives). The public information interest can often be served more effectively through a grant of access to journalists.

34 *See, e.g., Buie*, 494 U.S. at 337 (concerns over officer safety authorized protective sweep of parts of house after arrest on less than probable cause); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-74 (1989) (public's interest in deterring drug use and drug smuggling authorized mandatory drug testing of Customs Officers prior to promotion for positions involving drug interdiction and carrying of firearms); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (concerns for public safety authorized warrantless alcohol and drug tests of railroad employees); *New Jersey v. T.L.O.*, 469 U.S. at 339 (interest in maintaining discipline in classroom and on school grounds justified warrantless search of purse of student caught smoking in bathroom); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (concerns about enforcing immigration laws due to the economic and social ramifications of illegal immigration authorized stop of vehicles near border on less than probable cause); *United States v. Biswell*, 406 U.S. 311, 315-16 (1972) (concerns about preventing sales of guns to undesirable persons authorized warrantless inspections of gun dealers); *Wyman v. James*, 400 U.S. 309, 318-19 (1971) (concerns about monitoring child welfare and living conditions authorized warrantless home visit by caseworker to recipient of AFDC); *Terry*, 392 U.S. at 28, 29 (concerns over officer safety authorized stop and frisk based on less than probable cause).

In particular, the Court has acknowledged the reasonableness of measures designed to deter criminal conduct regardless of whether the measures are the most effective means of capturing evidence of a crime. For example, in *Sitz*, the law enforcement officers acknowledged that their main purpose in initiating a suspicionless sobriety checkpoint was to deter drivers from drinking and driving, *not* to increase drunk driving arrests. Nonetheless, the Court upheld use of the checkpoints as reasonable under the Fourth Amendment because of the strong public interest in detering drunk driving and drunk driving accidents. 496 U.S. at 455.[35] Nevertheless, the Ninth Circuit appears to have erroneously assumed that law enforcement interests outside searching for evidence and seizing suspects are not recognized by the Fourth Amendment. Pet. App. 4a (recognizing, but rejecting, fact that "the government wanted to publicize its efforts to combat environmental crime").

Moreover, the fact that CNN, like most members of the news media, is a for-profit entity is immaterial; surely, whether the media observer is CNN or a public television station should have no bearing whatsoever on the constitutional balance struck. Consequently, the preoccupation of

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35 *See also Griffin v. Wisconsin*, 483 U.S. 868, 875, 880 (1987) (upholding warrantless search of probationer's residence by probation officer to deter probationer from recidivism); *New York v. Burger*, 482 U.S. 691, 708-10 (1987) (upholding warrantless inspections of auto junkyards to deter junkyards from becoming markets for stolen autos and parts).

the *Berger* panel and the dissenting judges in *Wilson v. Layne* with the for-profit status of CNN and the *Washington Post*,[36] respectively, was improper, and disregarded well-settled law. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment" and there is no reason "why operation for profit should have any different effect in the case of motion pictures."); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from New York Times to Hustler Magazine would be little more than empty vessels.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)).

Finally, in considering the law enforcement interests advanced by conduct during the execution of a warrant, this Court has deferred in significant measure "to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Dalia v. United States*, 441 U.S. 238, 239 (1979) (finding covert entrance to install sur-

[36] Pet. App. 9a (search was a "commercial television/law enforcement enterprise"); *id.* at 9a-10a (purpose of search was for officials to "assist in the media obtaining material for their commercial programming"); *id.* at 16a ("Here, law enforcement authority was used to assist commercial television, not to further law enforcement objectives."); *Wilson v. Layne*, 141 F.3d at 119 (Murnaghan, J., dissenting) (Fourth Amendment violated when officers "invited newspaper reporters to enter a private home and photograph the residents for purely commercial newspaper purposes"); *id.* at 123 ("the media presence here served no legitimate law enforcement function, but rather was intended solely to gather news to profit the *Washington Post*"); *id.* ("A warrant does not carry with it the authority to bring along mere bystanders to observe for their own commercial purposes."); *id.* at 132 ("These reporters were in the Wilsons' home strictly for their own commercial newsgathering purposes.").

veillance device pursuant to surveillance order reasonable despite lack of specific authorization in warrant to covertly enter premises).

> Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant. . . . It would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers.

Id. at 258. Thus, the Sixth Circuit has held that the Fourth Amendment was not violated by law enforcement officers who, during the execution of a search warrant listing only an electronic device, brought with them a telephone company employee to identify telephone company property not listed in the warrant which the officers suspected—but did not have probable cause to believe—they would find on the premises. *Clouston*, 623 F.2d 485, 486-87.[37] Other courts have approved the decision of police officers bringing a civilian along to help identify stolen property despite the fact that the warrant executed did not authorize the civilian's presence. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) (where warrant specifically authorized "videotaping and photographing," Fourth Amendment not violated by media filming

[37] *Accord Scigliano*, 583 P.2d 893 (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *Superior Court of Marin County*, 598 P.2d 877 (robbery victim could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *Huggins*, 861 P.2d 1007 (Fourth Amendment not violated where officers procured warrant listing items identified by informant and brought informant along during search to identify items not listed in warrant).

search "even though the warrant said nothing about a television crew"); *People v. Boyd*, 474 N.Y.S.2d at 664.[38]

Fundamentally, the substantial public interests in enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police—each advanced by the FWS grant of permission to CNN to witness the execution of the warrants [39]—must yield to any incremental harm the Bergers suffered beyond that which is inherent in the significant intrusion on privacy permitted by the warrants. *See Buie*, 494 U.S. at 334 (even where intrusion is not "de minimis," the privacy interest must yield to important law enforcement interest). Simply put, society should not be prepared to recognize as constitutionally reasonable an expectation that the details surrounding the execution of the warrants on the Bergers' ranch be kept hidden from public view. Government execution of a warrant is not a private event, and the reasonable determination of the FWS that journalists may witness this event does not violate the Fourth Amendment.

[38] The presence at a search of non-law enforcement personnel who served some value to law enforcement has been upheld as reasonable with no consideration of whether the private party was mentioned in the warrant. *See, e.g., United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *Clouston*, 623 F.2d at 486-87; *Scigliano*, 583 P.2d at 895; *Superior Court of Marin County*, 598 P.2d at 878; *Huggins*, 861 P.2d at 1009; *Commonwealth v. Farrar*, 413 A.2d 1094 (Pa. 1979).

[39] The *Berger* panel placed great emphasis on the fact that CNN and the law enforcement agents reduced to writing the agents' grant of permission to CNN to observe the execution of the warrant. Pet. App. 9a-10a ("This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming."); *id.* at 12a (in none of the previous cases "did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case."). However, journalists *never* can observe the execution of a search warrant without the express agreement of the searching officers. The fact that the consent here was reduced to writing is of no consequence and does not distinguish this case from others where "ride alongs" were held not to violate any constitutional rights. *See, e.g., Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) ("We are unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness."); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980); *Moncrief*, 10 Media L. Rep. at 1620.

CONCLUSION

For the foregoing reasons, the CNN Respondents respectfully request that this Court reverse the decision of the Ninth Circuit and hold that Petitioners did not violate the Fourth Amendment by permitting journalists to observe the otherwise reasonable execution of valid warrants.

Respectfully submitted,

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